

**TECHNICAL AMENDMENT**  
**May 4, 2018**

**405 KAR 5:085. Enforcement.**

RELATES TO: KRS 350.010(2), 350.130, 350.240, 350.300, 350.990

STATUTORY AUTHORITY: KRS 350.028, 350.029, 350.240, 350.300

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 350 requires the cabinet to promulgate administrative regulations pertaining to noncoal mineral operations to minimize their adverse effects on the citizens and the environment of the Commonwealth. This administrative regulation establishes provisions governing the issuance of the various notices and orders to be issued by authorized representatives of the cabinet.

Section 1. General. (1) The secretary of the cabinet may designate authorized representatives to perform duties pursuant to the administrative regulations contained in 405 KAR Chapter 5.

(2) Unless the secretary has made a written order contrary to the terms of this subsection, personnel authorized by the Commissioner of the Department for Natural Resources shall be the authorized representatives of the cabinet for the purposes of this administrative regulation.

Section 2. Inspections. (1) General. In accordance with the provisions of 405 KAR Chapter 5, the cabinet shall conduct or cause to be conducted inspections, studies, investigations, or other determinations to obtain information and evidence to ensure that mineral operations shall be conducted in accordance with the provisions of all applicable statutes and administrative regulations, and all terms and conditions of the permit.

(2) Right of entry and access. Authorized employees of the cabinet shall have unrestricted right of entry to all parts of the mineral operation for any purpose pursuant to 405 KAR Chapter 5, including making inspections and delivering documents or information of any kind to persons associated with the mineral operation.

(3) Timing and frequency of inspections.

(a) The cabinet shall conduct periodic inspections of all mineral operations.

(b) Inspections shall ordinarily be conducted at irregular and unscheduled times during normal workdays, but may be conducted at night or on weekends or holidays if necessary to properly monitor compliance.

(c) The cabinet shall not have an obligation to give prior notice that an inspection will be conducted or to obtain a warrant.

(4) Citizens request for inspections.

(a) Any citizen may request that the cabinet conduct an inspection by furnishing to the cabinet a signed, written statement, or an oral report followed by a signed, written statement:

1. Giving the cabinet reason to believe that a condition or practice exists which is in violation of KRS Chapter 350, 405 KAR Chapter 5, or permit conditions; and

2. Listing a telephone number and address where the person can be contacted.

(b) The identity of any person supplying information to the cabinet relating to a possible violation or imminent danger or harm shall remain confidential with the cabinet if requested by that person, unless disclosure is required by law.

(c) Within a reasonable time, the cabinet shall send to the person the following:

1. If an inspection was not conducted, an explanation of the reason or reasons why; or

2. If an inspection was conducted, a description of the enforcement action taken, if any, or an explanation of why enforcement action was not taken.

Section 3. Notice of Noncompliance and Order for Remedial Measures. (1) All authorized representative of the cabinet shall issue a notice of noncompliance and order for remedial measures if, on the basis of an inspection, he finds a violation of KRS Chapter 350, 405 KAR Chapter 5, a permit condition, or another applicable requirement.

(2) A notice of noncompliance and order for remedial measures issued pursuant to this section shall be in writing and shall be signed by the authorized employee who issued it. The notice shall contain the following information:

- (a) The nature of the violation;
- (b) The remedial measures required, if any, which may include accomplishment of interim steps, if appropriate;
- (c) A reasonable time table for remedial action, if any, which may include a time table for accomplishment of interim steps, if appropriate; and
- (d) An adequate description of the portion of the mineral operation to which the notice applies.

(3) An authorized employee may modify an order for remedial measures for good cause, including correction of errors, changes in responsible parties, changes to remedial measures, and changes in abatement dates.

(4) Extensions and modifications of notices for remedial action. An authorized employee may extend the time set for remedial action or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by lack of diligence on the part of the person to whom the notice of noncompliance and order for remedial measures was issued.

(a)1. The total time for remedial action under the notice, including all extensions, shall not exceed ninety (90) days from the date of issuance of the notice except upon a showing by the mineral permittee that it is not feasible to abate the violation within ninety (90) calendar days due to one (1) or more of the circumstances established in paragraph (b) of this subsection.

2. An abatement period exceeding ninety (90) days pursuant to this subsection shall not be granted for a situation in which the mineral permittee's failure to abate within ninety (90) days has been caused by a lack of diligence or intentional delay by the mineral permittee in completing the remedial action required.

(b) The following circumstances may qualify mineral operations for an abatement period of more than ninety (90) days:

1. The mineral permittee of the ongoing mineral operation has timely applied for and diligently pursued a permit renewal or other necessary approval of designs or plans, but the permit or approval, for reasons not within the control of the mineral permittee, has not been and will not be issued prior to ninety (90) days after the valid permit or approval expires or is required;

2. There is a valid judicial order precluding abatement within ninety (90) days to which the mineral permittee has diligently pursued all rights of appeal and to which he has no other effective legal remedy;

3. The mineral permittee cannot abate within ninety (90) days due to a labor strike;

4. Weather conditions exist that would clearly cause more environmental harm than abatement measures would prevent; or

5. The action required would violate safety standards established by KRS Chapter 350, 405 KAR Chapter 5, or under the "Mine Safety and Health Act," 30 U.S.C. 801 through 965 or 30 C.F.R. Sections 1.1 through 104.5.

(c) If an abatement period in excess of ninety (90) days is approved by the cabinet, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public and the environment.

(d)1. If any of the conditions in paragraph (b) of this subsection exist, the mineral permittee may request the authorized representative of the cabinet to grant an abatement period exceeding ninety (90) days.

2. The authorized representative of the cabinet shall not grant an abatement period without the approval of the Director of the Division of Mine Reclamation and Enforcement or his designee, and the period granted shall not exceed the shortest possible time necessary to abate the violation. The mineral permittee shall have the burden of establishing by clear and convincing proof that he is entitled to an extension under the provisions of this subsection.

3. In determining whether or not to grant an abatement period exceeding ninety (90) days, the authorized representative of the cabinet may consider relevant written or oral information from the mineral permittee and other sources.

4. The authorized representative of the cabinet shall promptly and fully document in the applicable file the recommendation for granting or denying the request and the reasons.

5. The authorized representative's immediate supervisor shall review this document before approving or disapproving the extended abatement period and shall promptly and fully document the reasons for his approval or disapproval in the applicable file.

(e) A determination made pursuant to paragraph (d) of this subsection shall be in writing and shall be subject to administrative and judicial review pursuant to 400 KAR 1:120~~[405 KAR 7:095]~~.

(f) An extension granted pursuant to this subsection shall not exceed ninety (90) days in length. For a situation in which the condition or circumstance that prevented abatement within ninety (90) days exists at the expiration of the extension, the mineral permittee may request a further extension in accordance with the procedures of this subsection.

(5) Based upon the written recommendation of authorized representative of the cabinet who issued the notice or noncompliance and order for remedial measures, the director of the Division of Mine Reclamation and Enforcement may vacate a notice of noncompliance and order for remedial measures determined to be issued in error.

#### Section 4. Order for Cessation and Immediate Compliance. (1) Issuance.

(a) If the person to whom a notice of noncompliance and order for remedial measures has been issued fails to comply with the terms of the notice within the time for remedial action established in the notice or as subsequently extended, an authorized representative of the cabinet shall immediately issue to the person an order for cessation and immediate compliance.

(b) An authorized representative of the cabinet shall immediately issue an order for cessation and immediate compliance if he finds, on the basis of an inspection, a condition or practice; a violation of KRS Chapter 350; a violation of 405 KAR Chapter 5; or a violation of a term or condition of the applicable permit that:

1. Creates an imminent danger to the health or safety of the public; or
2. Is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

(c) An authorized representative of the cabinet shall immediately issue an order for cessation and immediate compliance if he finds, on the basis of an inspection, that mineral operations are being conducted by a person without a valid mineral operations permit for the activities in accordance with this chapter.

#### (2) Form and content.

(a) An order for cessation and immediate compliance shall be in writing and shall be signed by the authorized representative of the cabinet who issued it. The order shall establish with specificity:

1. The nature of the violation;

2. A reasonable description of the portions of the mineral operations to which it applies;
3. The remedial measures, if any, necessary to abate the violation in the most expeditious manner possible; and
4. The time established for abatement, if appropriate, including the time for complying with any interim steps.

(b) When the authorized representative of the cabinet issues an order for cessation and immediate compliance pursuant to subsection (1)(b) or (c) of this section, a notice of noncompliance and order for remedial measures shall also be issued.

(3) Effect.

(a)1. The order for cessation and immediate compliance shall require the cessation of all mineral operations or the portions or operations thereof relevant to the condition, practice, or violation covered by the order.

2. The order shall require the person to whom it is issued to take affirmative steps necessary to abate the condition, practice, or violation in the most expeditious manner possible. The order may require the use of existing or additional personnel and equipment.

(b) The order shall remain in effect until the condition, practice, or violation has been abated; until the order is vacated, modified, or terminated in writing pursuant to subsection (4) of this section; or until it is vacated, modified, or terminated by a hearing officer.

(c) Reclamation operations and other activities intended to protect public health and safety and the environment shall continue during the period of an order unless the order states that the reclamation operations and other activities shall cease.

(4) Modification, extension, vacation, and termination.

(a) An authorized representative of the cabinet may, by written notice, modify or terminate an order for cessation and immediate compliance issued under this section for good cause and may extend the time for abatement if the failure to abate within the time previously established was not caused by lack of diligence on the part of the person to whom it was issued.

(b) The secretary or his authorized representative shall terminate an order for cessation and immediate compliance, by written notice to the person to whom the order was issued, if it is determined that all conditions, practices, and violations listed in the order have been abated. Termination shall not affect the right of the cabinet to assess civil penalties for those violations or to impose other applicable sanctions as authorized by law.

(c) Based upon the written recommendations of the regional administrator and the authorized representative of the cabinet who issued the order for cessation and immediate compliance, the Director of the Division of Mine Reclamation and Enforcement may vacate an order for cessation and immediate compliance determined to have been issued in error.

(5) Within sixty (60) days after issuing an order for cessation and immediate compliance, the cabinet shall notify in writing a person who has been identified as owning or controlling the mineral permittee, that the cessation order was issued and that the person has been identified as an owner or controller.

**Section 5. Notice of Inspection of Noncompliance.** (1) Issuance. If an authorized representative of the cabinet issues a notice of noncompliance and order for remedial measures or an order for cessation and immediate compliance, the authorized representative shall reinspect the area affected by the mineral operations on or soon after the date established in the notice or order for completion of remedial measures. When this reinspection occurs, the authorized representative of the cabinet shall issue a notice of inspection of noncompliance.

(2) Form and content.

(a) The notice of inspection of noncompliance shall establish if:

1. The remedial measures have been completed, and the notice or order is therefore termi-

nated;

2. The remedial measures have not been completed, but the notice or order is modified or extended for good cause; or

3. The remedial measures have not been completed.

(b) Following a determination that the remedial measures have not been completed, the cabinet shall:

1. For situations in which the inspection was a reinspection of a notice of noncompliance and order for remedial measures, issue an order for cessation and immediate compliance; and

2. For situations in which the inspection was a reinspection of an order for cessation and immediate compliance and if the order for cessation and immediate compliance has not been abated, initiate:

a. An administrative hearing for suspension or revocation of the permit or approval;

b. An administrative hearing for bond forfeiture; or

c. Administrative hearings for other appropriate relief, in accordance with KRS 350.990 or KRS 350.028.

Section 6. Service of Notices and Orders. (1) A notice of noncompliance and order for remedial measures, an order for cessation and immediate compliance, and a notice of inspection of noncompliance shall be served on the person to whom it was issued or the person's designated agent promptly after issuance.

(2)(a) Each notice or order shall be served to the person to whom the notice or order has been issued or to his designated agent for service, by:

1. Hand;

2. Electronic mail with electronically generated receipt;

3. Certified mail, return receipt requested; or

4. Registered mail.

(b) The notice or order shall also be served to the individual who, based upon reasonable inquiry by the authorized representative, appears to be in charge at the site of the mineral operations referred to in the notice or order. If the individual cannot be located at the site, a copy of the notice or order may be tendered to an individual at the site who appears to be an employee or agent of the person to whom the notice or order has been issued.

(c) Service, whether by electronic mail, hand, or standard mail, shall be complete upon tender of the notice or order and shall not be incomplete because of refusal to accept.

(d) For mineral operations, service by mail shall be addressed to the designated agent for service; to the electronic or permanent address of the mineral permittee as identified on the permit or in the application; or, if an address is unavailable for the mineral permittee in the application, to another address as is known to the cabinet. If a person cannot be found present at the site of the mineral operations, services by mail shall by itself be sufficient notice.

(3) Designation by a person of an agent for service of notices and orders issued pursuant to this administrative regulation and notices of hearing issued pursuant to 400 KAR 1:120~~[405 KAR 7:095]~~, shall be made a part of the applicable permit application. The person shall continue as agent for service of process until written revision of the permit is approved that designates another person as the agent.

(4) The cabinet may furnish copies of notices and orders to any person having an interest which is or may be adversely affected by the mineral operations and any person having an interest in the permit.

Section 7. Penalties. The cabinet may assess penalties pursuant to KRS 350.990. (21 Ky.R. 770; 1139; 2116; eff. 2-22-1995; TAm eff. 8-9-2007; 38 Ky.R. 662; 991; 1301; eff. 2-3-2012;

TAm eff. 5-4-2018.)